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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6156

MALLIE LEWIS,

Appellant,

v.

CITY OF NEW ORLEANS,

Appellee.

APPEAL FROM THE SUPREME COURT OF LOUISIANA

APPELLANT'S BRIEF

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THE PREVIOUS OPINIONS

This case comes before the Court for a second time. The latest opinion of the Louisiana Supreme Court, issued pursuant to a remand by this Court, is reported at 263 La. 809, 269 So.2d 450 (1972) (A. 47-63). The memorandum opinion of this Court directing that remand is reported at 408 U.S. 913 (1972) (A. 45). The

original memorandum opinion of the Louisiana Supreme Court from which the first appeal to this court was taken is reported at 257 La. 993, 244 So.2d 860 (1971) (A. 44). The opinion of the Criminal District Court for the Parish of Orleans is unreported and is printed in the Appendix at 43.

JURISDICTION

This is an appeal from the Supreme Court of Louisiana, the highest court of the State of Louisiana. Jurisdiction is conferred upon this Court by 28 U.S.C. §1257(2) since this case involves the validity under the Constitution of the United States of a city of New Orleans ordinance and the decisions below have been in favor of the ordinance's validity. The judgment of the Supreme Court of Louisiana was entered on November 6, 1972; notices of appeal were filed in the Supreme Court of Louisiana and the Criminal District Court for the Parish of Orleans on January 31, 1973 and February 1, 1973 respectively; the jurisdictional statement was filed and the appeal docketed on February 5, 1973; all within the ninety day period prescribed by Rule 11 and Rule 13 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves the First Amendment and Section One of the Fourteenth Amendment to the Constitution of the United States and Section 49-7 of Ordinance No. 828 M.C.S., known as the Code of the City of New Orleans of 1956. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Section One of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 49-7 of Ordinance No. 828 M.C.S., known as the Code of the City of New Orleans of 1956, provides:

It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.
"Code of the City of New Orleans, General Ordinances," Michie City Publications Co., Charlottesville, Virginia; page 641 (A. 6).

QUESTIONS PRESENTED

Is a New Orleans ordinance making it unlawful "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty" unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendment and has that ordinance been constitutionally applied to the appellant in the proceedings below.

STATEMENT OF THE CASE

On January 3, 1970, the appellant Mallie Lewis was arrested for violating the ordinances of the City of New Orleans by reviling the police, 828 M.C.S. 49-7, and resisting arrest, 828 M.C.S. 49-2. She was charged with these offenses by affidavits filed with the Municipal Court for the City of New Orleans. (A. 3-6). On April 17, 1970, she was tried before a judge without a jury,[1] was found guilty of both charges, and was sentenced to pay a fine of ten dollars or to serve ten days in jail on each charge. (A. 7-42). Appellant moved to arrest the judgment of the Municipal Court on the ground that Section 49-7 violated the Federal Constitution in that it was vague and overbroad both on its face and as applied; the motion was denied.[2] (R. 49).

Appellant filed an appeal with the Criminal District Court for the Parish of Orleans, which has appellate jurisdiction over the Municipal Court.[3] (R. 50-51). On December 15, 1970, the Criminal District Court affirmed

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[1] The maximum penalty for each offense is ninety days in jail and/or a one-hundred dollar fine. Under Louisiana law, providing for trial by a jury only when the possible penalty exceeds five-hundred dollars or six months imprisonment, Mrs. Lewis had no right to a jury trial. LSA - C.Cr.P., Art. 779.

[2] Under Louisiana jurisprudence a citizen has a right to resist an unlawful arrest. *City of Monroe v. Ducas*, 203 La. 971, 14 So.2d 781 (1943); *State v. Lopez*, 250 La. 108, 235 So.2d 394 (1970). Appellant's attack on her arrest and conviction for reviling the police thus indirectly brings into question, on state law grounds, her arrest and conviction for resisting.

[3] LSA - Const., Art. VII, Sec. 82, 94. The appellate jurisdiction of the Criminal District Court extends to questions of both law and fact; the appeal is based only on the record and evidence in the Municipal Court and is not a trial de novo. *Id.*

the conviction and sentence specifically addressing the constitutional issue and finding Section 49-7 "not vague or overbroad." (A. 43).

Appellant sought to invoke the supervisory jurisdiction of the Louisiana Supreme Court[4] and applied to that Court for a writ of certiorari. (R. 76-85). On March 10, 1971, the Louisiana Supreme Court refused to grant the writ, holding, with one justice dissenting, that the judgment of the Criminal District Court was correct. *City of New Orleans v. Lewis*, 257 La. 993, 244 So.2d 860 (1971). (A. 44).

On June 7, 1971, appellant docketed her first appeal with this Court. *Lewis v. City New Orleans*, No. 70-5323. On June 26, 1972, this Court vacated the judgment of the Louisiana Supreme Court and remanded this matter for reconsideration in light of *Gooding v. Wilson*, 405 U.S. 518 (1972). 408 U.S. 913 (1972) (A. 45-46).

On remand the Louisiana Supreme Court on November 6, 1972 affirmed appellant's convictions for reviling the police and resisting arrest and held the ordinance constitutional; three of seven justices dissented. *City of New Orleans v. Lewis*, 263 La. 809, 269 So.2d 450 (1972). (A. 47-63). Because the case was originally before the Louisiana Supreme Court on an application for a writ of certiorari, which application was denied, the Louisiana Supreme Court did not have before it the trial court record, particularly the transcript, and so had no sure knowledge of what appellant's actions consisted or of the attendant circumstances. *City of New Orleans v. Lewis, supra*, 269 So.2d at 451, fn. 1. (A. 47).

From this second decision of the Louisiana Supreme Court appellant filed the instant appeal. Mrs. Lewis is

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[4] LSA - Const., Art. VII, Sec. 10.

presently free on the suspensive appeal bond originally filed with the Municipal Court. (R. 50-51).

The facts and circumstances surrounding the appellant's arrest were disputed. The trial testimony upon which her convictions were based shows the following. In the late afternoon of January 3, 1970 Mallie Lewis' son, Joseph Lewis, Jr., was arrested by the police. When Mrs. Lewis and her husband, Joseph Lewis, Sr., learned of the arrest they went to the scene where their son was being held in a police car, first Mr. Lewis then Mrs. Lewis. One of the officers on the scene, apparently involved in some way in the arrest, was Officer Berner. When the Lewises arrived on the scene their son told each of them that he was afraid the police were going to beat him. (A. 9, 26,33). Joseph's declarations combined with the fact that their son was kept in the patrol car for over an hour and a half without being taken to the lockup made the Lewises concerned about their son's well being. (A. 26,33-34,40). At one point Mr. Lewis asked the police why they were holding Joseph and was told, "if you want to find out follow us to the lockup." (A. 26). While Mr. Lewis was waiting for his son to be taken to the lockup he was told by Officer Berner to move away, a request he complied with and which he subsequently communicated to his wife. (A. 26,33).

Eventually the police officers prepared to transport Joseph to the lockup. Because of their concern about Joseph and upon the suggestion of one of the police officers, the Lewises attempted to follow their son to the lockup. (A. 26,33). The first car to leave was the patrol car carrying Joseph; then came the patrol car carrying Officer Berner; then came the Lewises in their pick-up truck. (A. 26,33,40). The Lewises attempted to keep sight of the car carrying their son but because Officer

Berner's car was between them and was traveling slowly, they eventually lost sight of the first car. (A. 26-27, 33-34). At about this time Officer Berner pulled his car off the highway and allowed the Lewises' truck to pass; the Lewises meanwhile, having lost the first car, decided to go directly to the lockup. Officer Berner then pulled his car back onto the highway and stopped the Lewises' truck. (A. 27,34). There was no testimony that prior to this stop either Mr. Lewis or Mrs. Lewis had in any way by word or action interfered with or hindered the police in any of their activity.

As to the events following the stop of the truck there is a sharp divergence in testimony. According to Officer Berner he stopped the truck to find out why the Lewises were following him. (A. 8). Addressing Mr. Lewis as "cap," he asked this of Mr. Lewis when Mr. Lewis got out of the truck. (A. 19) When Mr. Lewis responded that he was trying to find out where his son was, Officer Berner said that he didn't have his son and asked Mr. Lewis to produce a driver's license. At this time Mrs. Lewis got out of the truck and according to Berner started yelling questions about the whereabouts of her son. Berner testified that he instructed Mrs. Lewis to return to the truck whereupon Mrs. Lewis said, "you god damm m.f. police—I am going to Giarrusso [the Superintendent of Police] to see about this." Berner testified further that at this point he told Mrs. Lewis she was under arrest, that Mrs. Lewis went to get back in the truck, and that as she did so he took hold of her, an act she resisted.[5] (A. 8). Defense counsel was not permitted by the trial court to

[5] Mr. Lewis was alleged to have assisted Mrs. Lewis in resisting the arrest and was himself arrested and charged with assault. He was tried jointly with the appellant, Mallie Lewis; the charge against him, however, was dismissed. (A. 24, 41).

cross-examine Berner about his participation in and his knowledge of the earlier incident involving the arrest of the Lewises' son, Joseph. (A. 10-17). There was no testimony or evidence that in any way suggested that the alleged utterance of Mrs. Lewis was regarded by Berner as particularly provocative or that he was in any way inclined to respond in a violent manner. Indeed the calm reaction of Officer Berner, "Lady you are going to jail—you are under arrest" suggests quite the contrary. (A. 8). Similarly there was no evidence that the utterance prevented Berner from performing his duty or that it was overheard by any member of the public.

The version of the events following the stop as testified to by the Lewises was far different from Officer Berner's account. According to the Lewises as soon as Berner stopped them he declared that he was going to show them that they couldn't follow the police all over the streets and started cursing Mr. Lewis. (A. 27). When Mrs. Lewis got out of the truck and asked about her son, Officer Berner ordered her to "get your black ass in the goddamned car" and continued to curse the Lewises using such terms as "black son of a bitch" and "black mother fucker." (A. 27,34-35). When Mrs. Lewis protested that she was going to see Superintendent Giarrusso, Berner told her she was going to jail and at that point attempted to arrest her. (A. 35). Mrs. Lewis denied using any obscene language to Berner and specifically denied using the phrase "god damn m.f. police." (A. 34,37-38).

SUMMARY OF ARGUMENT

Mallie Lewis was convicted of reviling the police in violation of Section 49-7 of the New Orleans City Code (A. 6). At the time of her trial no limiting construction

had been placed upon the ordinance and no interpretation was made by the trial court. The ordinance as written is a broad proscription of all opprobrious language and is little more than a law designed broadly to protect the sensibilities of the police. As written it encompasses both speech which is protected by the First Amendment and speech that may properly be prohibited. It is as written vague and overbroad. Since it is impossible to determine by what standard the trial judge measured the appellant's speech the conviction must be reversed whether or not there has been a subsequent narrowing construction that comports with the First Amendment.

There has been in fact no narrowing construction of the ordinance and so even in light of the opinion of the Louisiana Supreme Court on remand, the ordinance still remains vague and overbroad. The opinion of the Louisiana Supreme Court is nothing other than an attempt to justify the facial overbreadth of the ordinance. The Louisiana Supreme Court although paying lip service to the concept of "fighting words" has maintained the broad proscription of all reviling, cursing, and obscene and opprobrious language and has not read into the statute a requirement that the language be likely to provoke an immediate violent response. The ordinance thus continues to proscribe a broader class of language than that countenanced by *Gooding v. Wilson*, 408 U.S. 518 (1972).

The apparent justifications of the Louisiana Supreme Court for maintaining such a broad proscription against speech are untenable. Although it is true that some speech may amount to an interference and thus prevent the police from performing their duty, that fact cannot justify an ordinance that proscribes all speech. The ordinance does not have a functional relevance to this

otherwise legitimate goal because it proscribes all opprobrious language, whether or not effecting an interference, and further because it fails to proscribe other varieties of language which may equally under certain circumstances effect an interference. Legitimate state objectives cannot justify an ordinance which sweeps far broader than is necessary to accomplish those objectives. Similarly, the ordinance cannot be justified as a regulation of speech consistent with the state's power, while not to prohibit the content of speech, to regulate the time, place and manner of its utterance. The ordinance is broadly written to apply to a police-citizen encounter at any time and at any place. The circumstances of police operations are not such that all opprobrious speech is necessarily incompatible with the police activities. To the contrary much police activity is necessarily violent, tumultuous, and indelicate; the utterance of certain languge at the time of such activity can hardly be said to endanger that activity.

Even if the Louisiana Supreme Court has narrowed the ordinance to "fighting words" it has not done so in a fashion that insures that the ordinance will not be applied to language that is protected by the First Amendment. Although it may be possible that certain opprobrious language uttered among civilians may per se amount to "fighting words," this approach cannot satisfactorily be applied to citizen-police encounters because of the policeman's higher degree of training and because of the unique circumstances of such encounters. Language which in other circumstances might amount to fighting words will not be such when uttered by a citizen to a police officer without any intent to provoke a violent response, under circumstances such that the officer cannot reasonably be expected to interpret the language as having an intent to provoke, and under circumstances

such that there is no likelihood of a violent response by the police officer. Language uttered under these circumstances is a protected expression of an emotional feeling, and although superficially appearing to be "fighting words" such language poses no danger to society or to the police. The failure of the Louisiana Supreme Court to require a focus on the circumstances surrounding an opprobrious utterance to the police and its implicit holding that certain opprobrious language is in all circumstances "fighting words" leaves the ordinance still vague and overbroad.

The actual application of the "fighting words" standard to the facts of the instant case is unconstitutional. The utterance alleged here might well be "fighting words" if uttered in a personally provocative fashion without any other apparent purpose, for example in the course of a chance meeting. Here, however, the words were uttered by an emotionally upset woman, who felt aggrieved by specific police conduct directed to her and her family; the words were plainly uttered not to provoke the officer but to give vent to otherwise inexpressible emotions; the officer had no reason to believe that she was attempting to provoke him; and in light of the nature of the encounter there was no reasonable likelihood that the officer would be provoked.

ARGUMENT

I:

AS WRITTEN THE NEW ORLEANS REVILING THE POLICE ORDINANCE MAKES UNLAWFUL A BROADER CLASS OF SPEECH THAN "FIGHTING WORDS." ABSENT A LIMITING CONSTRUCTION, THEREFORE, IT IS UNDER *GOODING v. WILSON* UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Appellant was tried and convicted of reviling the police in violation of an ordinance which reads as follows:

> "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to a member of the city police while in the actual performance of his duty." (A. 6).

This ordinance quite clearly purports to regulate pure speech. As such it cannot stand unless it is carefully and specifically limited to those narrowly defined classes of speech that are beyond the scope of the First Amendment. *Cohen v. California*, 403 U.S. 15 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). If the ordinance does not clearly delineate the contours of its proscription it is vague; and if it applies to speech that is protected, speech not within the exceptions to the First Amendment, it is overbroad. In either event the ordinance is unconstitutional under the First and Fourteenth Amendments and appellant's conviction must be reversed whether or not appellant's speech was itself protected. *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972); See

also, Note, "The Overbreadth Doctrine," 83 Harv. L. Rev. 844 (1970); Note, "The Void for Vagueness Doctrine in the Supreme Court," 109 U. Pa. L. Rev. 67 (1960).

Unless the limitation of this ordinance to language that involves the police provides a basis for either broadening or narrowing the class of speech which may be proscribed (See Part IV, *infra*, pp. 24-29) it is immediately clear that this ordinance must be tested against the standards enunciated in *Gooding v. Wilson, supra*. There this Court struck down as vague and overbroad a Georgia statute making it unlawful,

> "... without provocation [to] use to or of another, and in his presence ... opprobrious or abusive language tending to cause a breach of the peace." Georgia Code Ann. §26-6303.

The statute was invalid in that, neither as written nor as construed, was it limited to "fighting words" but that instead it encompassed language, that while offensive and obnoxious, was not likely to provoke an "immediate violent response". *Gooding v. Wilson, supra* at 528.

The similarity between the New Orleans ordinance and the Georgia statute is clear. There was no effort in *Gooding v. Wilson* to defend the Georgia statute as written, the State admitting and the Court finding that it could be upheld only if there had been a limiting construction by the state courts. *Id*, 405 U.S. at 520,524. It would accordingly appear beyond dispute that the New Orleans ordinance is as written plainly unconstitutional. The ordinance here suffers from all the defects of the Georgia statute and more. Unlike the Georgia statute the ordinance is not even limited to face-to-face situations but rather encompasses words spoken merely "with reference to" a police officer; the ordinance is thus

facially applicable to certain forms of purely private conversation where there is no attendant danger of violence. Again unlike the Georgia statute, the ordinance here embodies not even the slightest requirement that the words tend to cause a breach of the peace. The ordinance's reference to a breach of the peace is nothing more than a legislative declaration that opprobrious words are per se illegal and per se a breach of the peace. The ordinance apparently reflects a judgment that unseemly language can be outlawed simply because it is unseemly, with no further showing required. This position, of course, has been thoroughly rejected. *Cohen v. California, supra; Gooding v. Wilson, supra; Terminiello v. Chicago, supra.* As it is written the New Orleans ordinance contains no intimation that it is restricted to face-to-face utterances of language so provocative that it is likely to bring about an immediate violent response; indeed the ordinance proscribes a much broader range of speech than does the Georgia statute. As written Section 49-7 is not a law "carefully drawn to punish only unprotected speech," *Gooding v. Wilson, supra* at 522, but instead it is so written as to be "easily susceptible to improper application." *Id* at 528.

II.

AT THE TIME OF APPELLANT'S TRIAL THERE HAD BEEN NO NARROWING CONSTRUCTION OF THE ORDINANCE BY ANY LOUISIANA COURT AND NONE WAS ATTEMPTED BY THE TRIAL COURT. THE APPELLANT'S CONVICTION MUST THEREFORE BE REVERSED, WHETHER OR NOT THERE HAS BEEN A SUBSEQUENT INTERPRETATION, BECAUSE IT IS NOT CLEAR BY WHAT STANDARDS THE TRIAL COURT APPRAISED HER SPEECH.

At the time the appellant was charged, tried, and convicted for reviling the police there had been no construction or interpretation of the ordinance. To counsel's knowledge the instant case is the first case involving the reviling ordinance to have gone before any appellate court in Louisiana. Nor, to counsel's knowledge were there any Louisiana cases interpreting or applying ordinances similar to the instant one. Accordingly when the appellant was tried in 1970, she was tried under the plain terms and meaning of the ordinance, there having been no prior guidance given to the trial court by any of the higher courts in Louisiana.[6]

Since the case was tried without a jury, there are no jury instructions by which we can ascertain the standard followed by the trial court in determining the guilt of the appellant. The record, however, does suggest what one would otherwise presume, that the trial judge followed

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[6] There is one other Louisiana case involving the ordinance. *City of New Orleans v. Martin*, 260 La. 691, 257 So.2d 152 (1972); vacated and remanded, 409 U.S. 944 (1972). *Martin*, however, was both tried and appealed after the instant case. On appeal it was summarily affirmed by both the Criminal District Court and the Louisiana Supreme Court. No decision has yet been rendered pursuant to the remand.

the plain wording of the ordinance. See, e.g., the trial dialogue at A. 15, "Court: Prove the person didn't revile the police. *That's the whole case.*" (emphasis added).

Whether or not there has now been a constitutionally limiting construction of the ordinance (See Part III, *infra*, pp. 19-24), appellant's conviction cannot stand for she was tried under the ordinance as written, under an ordinance which made unlawful both protected and unprotected conduct. *Shuttlesworth v. Birmingham*, 382 U.S. 87, 92-93 (1965); *Street v. New York*, 394 U.S. 576, 585-587 (1969); *Ashton v. Kentucky*, 384 U.S. 195, 198, (1966); *Bachellar v. Maryland*, 397 U.S. 564, 570-571 (1970). Both *Shuttlesworth v. Birmingham, supra*, and *Street v. New York, supra*, were judge tried cases in which it was impossible to ascertain the basis for the lower court's judgment. The language of this Court in *Shuttlesworth v. Birmingham, supra* at 92, applies with equal force here.

> "The present limiting construction of the [ordinance under which Shuttlesworth was convicted] was not given until ... two years after the petitioner's conviction in the present case ... the trial court in the present case was without guidance from any state appellate court as to the meaning of the ordinance.
>
> The trial court made no findings of fact and rendered no opinion. For all that appears, that court may have found the petitioner guilty only by applying the literal and unconstitutional terms of the ordinance ... Because we are unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construal of the ordinance, the petitioner's conviction ... cannot stand.

It is impossible to say here whether the trial judge measured the appellant's language by the "fighting words" standard or whether he merely measured it against some standard of general offensiveness. In the instant case we do not have the benefit even of a charging paper that specifies the precise conduct or speech for which the appellant was tried and convicted; we have only an affidavit charging that she violated Section 49-7. (A. 3-4). Compare, *Gooding v. Wilson, supra*, at 519, fn. 1, in which the charging paper, an indictment, specified the actual language used, the fact it was spoken in the presence of the person spoken about, and the fact that it tended to cause a breach of the peace. Since the ordinance does not require that the words be spoken without provocation, it is not inconceivable that the appellant was convicted on her admission that she said "you are another one" after Officer Berner allegedly called her a "black mother fucker." (A. 37).

Given the initial as written overbreadth and vagueness of the instant ordinance, appellant was given no fair notice at the time of the trial of what she should defend herself against. Any subsequent interpretation is of no avail to her in planning her defense at the original trial. Quite clearly had trial counsel known that the statute might later be upheld and justified as applying only to "fighting words," his defense would have been different. Officer Berner would have been probed as to his reaction to the words, the nature of his everyday experiences, and the sort of training he had received. Counsel here is not suggesting that if there has been an interpretation, that it was a broadening one, merely that knowledge of the contours of any subsequent interpretation were not fairly chargeable to the appellant at the time of her trial. Appellant at a minimum had a right to be advised of the

precise charge against her, and the essential elements thereof, so that she might adequately and appropriately defend herself. *Cole v. Arkansas*, 333 U.S. 196 (1948), *Gregory v. Chicago*, 394 U.S. 111 (1969). As it is unclear under what standard appellant's conduct was judged by the trial court and as the appellant was given no fair notice as to the elements of the offense with which she was charged, the conviction is invalid whether or not there has now been a saving construction of the ordinance. *Shuttlesworth v. Birmingham, supra; Cole v. Arkansas, supra; Herndon v. Lowry*, 301 U.S. 242 (1937); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

III.

THE LOUISIANA SUPREME COURT HAS FAILED TO LIMIT THE SWEEP OF THE ORDINANCE TO "FIGHTING WORDS" AND THE ORDINANCE, THEREFORE, REMAINS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

The opinion of the Louisiana Supreme Court on remand from this court, *City of New Orleans v. Lewis*, 263 La. 809, 269 So.2d 450 (1972) has failed to limit the scope of the ordinance's proscription to fighting words; the ordinance now, just as it did before the first appeal to this Court, remains susceptible of application to words which while insulting, opprobrious, or obscene[7] are not such as would likely provoke an immediate violent response.

The Louisiana Supreme Court opinion is not a hallmark of clarity. Having been directed to reconsider this

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[7] Reference to the word "obscene" both in this brief and in the ordinance is in the conventional sense not the constitutional sense. Most assuredly the ordinance is not directed to speech which appeals to anyone's purient interest. Cf. *Cohen v. California, supra*, at 20.

case under *Gooding v. Wilson*, it appears that the court sought more to distinguish the present ordinance and to uphold it on its face because of its limited application only to language spoken of the police than it did to limit the breadth of its proscription to "fighting words." Whether limitation of the ordinance to words spoken of the police provides a constitutionally acceptable justification for outlawing all speech that is merely opprobrious and that is not likely to produce a violent response will be considered in Part IV, *infra*, pp. 24-29. The question here is whether the ordinance, in light of the opinion below, still outlaws more than "fighting words." Although the opinion does pay lip service to the concept of "fighting words," it totally fails to focus on the meaning of the standard as applying strictly to language that is likely to provoke an immediate violent response. Essentially the opinion declares that all reviling, cursing, and obscene and opprobrious language is per se "fighting words." This is directly contrary to this Court's holding in both *Cohen v. California, supra,* and *Gooding v. Wilson, supra*. The court below addressed the ordinance as written and declared that "...what *is* prohibited are 'fighting words' "; the ordinance "... *is* narrowed to 'fighting words' ". 269 So.2d at 456 (A. 56). (emphasis added). It did not construe the ordinance and give the lower courts guidance as to how to measure a defendant's speech; instead it authorized convictions whenever the court found that the words uttered were abusive or opprobrious. That this is so can be seen by examining portions of the court's opinion which repeatedly declare that the utterance of language is alone sufficient to convict:

"... it stands to reason that wantonly cursing or reviling, or using obscene or opprobrious language

toward or with reference to any police officer while in the actual performance of his duty is a breach of the peace." 269 So.2d at 454. (A. 52-53).

"Wantonly cursing, reviling, or using obscene or opprobrious words are not protected means of communication. Prohibiting such is not a restraint of the area of public discussion." 269 So.2d at 456. (A. 56).

"...the prohibitions of Section 49-7 are self-explanatory;... The proscriptions are narrow and specific—wantonly cursing, reviling, and using obscene or opprobrious language." 269 So.2d at 456. (A. 56-57).

In each of these declarations the court below unequivocally reveals its belief that the mere utterance of words can be constitutionally punished.

The failure of the court below either to understand or follow the decision in *Gooding v. Wilson* is evidenced by its discussion of the words "breach of the peace". In *Gooding v. Wilson* the state argued that the phrase "tending to cause a breach of the peace" embodied the "fighting words" standard and gave the statute the necessary element that the words be likely to result in an immediate violent response. *Id* at 524. This Court considered the argument at length and concluded that the term "breach of the peace" had not been sufficiently limited to violent situations but instead had been applied to situations where only someone's tranquillity had been disturbed. *Id* at 525-527. Accordingly the phrase still made it a crime "merely to speak words offensive to some who hear them and so sweeps too broadly" *Id* at 527.

Inexplicably, the court below considered the New Orleans ordinance superior to the Georgia statute because

instead of requiring that the words have some tendency toward a breach of the peace, the New Orleans ordinance provides that "it *shall* be a breach of the peace" 269 So.2d at 453. (A. 51). This comment by the Louisiana Supreme Court underscores that court's failure to focus on the requirement that the words proscribed must only be such as will likely provoke a violent response. The proscription of the New Orleans ordinance is obviously broader than that of the Georgia statute; the Georgia statute at least, with its phrase "tending to cause a breach of the peace," incorporated an element requiring that the words be regarded as offensive by someone. The New Orleans ordinance lacks even this much; the words themselves are a "breach of the peace." Even if no one be offended thereby, the utterance of certain language is unlawful. The court below affirms this absolute rule when it states that since a police officer is one who keeps the peace, it stands to reason that opprobrious language with reference to him is a breach of the peace, 269 So.2d at 454. (A. 52-53), and is therefore punishable.

The failure of the Louisiana Supreme Court's opinion to address itself to that part of the ordinance which appears to proscribe language spoken only with "reference to" the police and not necessarily in their presence again reveals that court's lack of regard for the essential aspect of the "fighting words" standard. There can be no danger of violence if the words are not heard by the person about whom they are spoken; there can be, therefore, no justification under either *Chaplinsky v. New Hampshire* or *Gooding v. Wilson* to outlaw such language. Yet, as the dissenting opinion below of Justice Tate points out, 269 So.2d at 457-460 (A. 57-63) the Louisiana Supreme Court wholly failed to excise this portion of the ordinance.

The opinion of the Louisiana Supreme Court places some emphasis on the appearance in the ordinance of the word "wantonly." The word is several times emphasized in the majority opinion. 269 So.2d at 456 (A. 55-56). That opinion fails however to limit the scope of this word of multiple meanings. Wanton is variously defined as "lacking discipline", "excessively merry", "unchaste", "marked by or manifesting heedless disregard of justice or of the rights of others", "willfully malicious", "unrestrained", and "extravagant". Webster's Third New International Dictionary (1961). Nowhere does the opinion indicate which or what content is to be given to this modifier, and in any event no customary definition of "wantonly" embodies the element that words thus spoken are words which are likely to produce an immediate violent response.

Appellant submits that the opinion of the Louisiana Supreme Court below clearly shows no intent to limit the written scope of the ordinance; to the contrary that court adopted a per se rule that all opprobrious language spoken with reference to a police officer was punishable. Instead of limiting the statute by construing it to mean that all opprobrious language that amounts to "fighting words" is punishable it has upheld the ordinance as written by saying that all opprobrious language is per se "fighting words." The opinion thus emasculates the holdings of *Gooding v. Wilson, supra; Cohen v. California, supra;* and *Chaplinsky v. New Hampshire, supra.*

At a bare minimum the opinion below is obscure and provides no sure guidance to the Municipal Court in New Orleans as to the constitutional limits of the ordinance. If indeed the opinion below is a narrowing construction of the ordinance it is not one so precisely and specifically drawn as to insure that the ordinance will not in the

future be applied to protected speech. *Gooding v. Wilson, supra; Chaplinsky v. New Hampshire, supra; Cantwell v. Connecticut, supra; Speiser v. Randall*, 357 U.S. 513 (1958); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963). It must be remembered that this ordinance is enforced at the lowest level of the judiciary, where the punishment meted out is in the order of a $10.00 fine; the real enforcement is perhaps in the actuality of an arrest by the police and the temporary incarceration awaiting bond. In these circumstances it would be pure sophistry to believe that the opinion of the Louisiana Supreme Court on remand had so clearly narrowed the overbreadth of this ordinance that the New Orleans police and the Municipal Court are now properly instructed as to its permissible scope.

IV.

BECAUSE THE ORDINANCE FAILS TO FOCUS SPECIFICALLY ON A PARTICULAR HARM THAT MAY RESULT WHEN OPPROBRIOUS LANGUAGE IS SPOKEN TO THE POLICE, THE MERE LIMITATION OF THE ORDINANCE TO LANGUAGE SPOKEN ONLY OF OR TO THE POLICE PROVIDES NO ACCEPTABLE JUSTIFICATION FOR TOTALLY CONDEMNING A CLASS OF SPEECH BROADER THAN "FIGHTING WORDS."

The mere fact that Section 49-7 applies only to language spoken of a police officer in the performance of his duty does not justify a proscription that sweeps broader than "fighting words." The opinion of the Supreme Court of Louisiana apparently holds otherwise and suggests that the broad proscription of opprobrious language is validated by the state's "interest in preserving the efficient and effective operation of the police force", 269 So.2d at 454 (A. 53), and by the fact that such

language is "basically incompatible with the officer's activities and the place where such activities are performed," 269 So.2d at 456 (A. 56).

This Court has on many occasions upheld statutes that indirectly regulate the exercise of First Amendment expression either because the nonexpressive elements thereof impinge upon a vital governmental interest or because the manner of the expression is unreasonable in light of and incompatible with the surrounding circumstances. *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Gregory v. Chicago*, 394 U.S. 111, 117-121 (Black, J., concurring); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Colten v. Kentucky*, 407 U.S. 104 (1972); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). To support a statute under such a theory however, it is mandatory that the statute assert the particular interest deemed so important as to restrict the First Amendment exercise and that it focus only on those elements of the First Amendment exercise which impinge upon that interest.

> "...the Court has repeatedly warned States and governmental units that they cannot regulate conduct connected with [First Amendment] freedoms through use of sweeping, dragnet statutes that may, because of vagueness, jeopardize these freedoms.... the Constitution does not bar enactment of laws regulating conduct, even though connected with speech, press, assembly, and petition, *if such laws specifically bar only the conduct deemed obnoxious and are carefully and narrowly aimed at that forbidden conduct. Gregory v. Chicago*, 394 U.S. 111, 117-18 (1969) (Black, J., concurring) (emphasis added).

The fault of the ordinance here is that it is not restricted in its application to those elements and consequences of speech to a police officer that may indeed be lawfully prohibited. The ordinance in its great breadth has no functional relevance to the legitimate interests that the State may narrowly protect.[8] Appellant has no doubt that to detain a police officer on the street and repeatedly to harangue him with words, whether offensive or inoffensive, may effectively impair the officer's ability to perform his duty and so interfere with an important state interest. Precisely such speech and conduct was found unprotected in *Colten v. Kentucky*, *supra*, where this Court emphasized that the State had a "legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible interference or interruption from bystanders, even those claiming a third party interest in the transaction", *Id*, 407 U.S. 109. There however the conviction was obtained under an ordinance that as written provided that the conduct be done with an "intent to cause public inconvenience, annoyance or alarm", *Id*, 407 U.S. 108, and that as interpreted required that there either be no intent to exercise a constitutional right or that the interest to be advanced by that exercise be miniscule in comparison with the attendant inconvenience, annoyance and alarm. *Id*, 407 U.S. 111. The ordinance here clearly lacks any such focus. If the intent were indeed to prevent interference with the police the statute would not be limited only to opprobrious and obscene language, for

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[8] Compare, New Orleans ordinance 828 M.C.S. 49-6, providing that, "It shall be unlawful and shall be considered a breach of the peace for any person willfully to obstruct, hinder or unlawfully interfere with any member of the city police while in the performance of his duty."

any language can under certain circumstances constitute an interference. See, e.g., *Colten v. Commonwealth of Kentucky, supra*. On the other hand neither all obscene and opprobrious language nor all polite and genteel language will necessarily effect an interference. While it cannot be gainsaid that, "wanton interference with a policeman while he is endeavoring to discharge his duties creates a threat to the community at large," 260 So.2d at 454 (A. 53); it does not logically follow, however, that the State may constitutionally proscribe all obscene and opprobrious language. Just as the fact that some opprobrious language addressed to a citizen may amount to "fighting words" does not justify a condemnation of all opprobrious language; similarly the fact that some opprobrious language addressed to an officer may effect an interference cannot justify a total ban on all such language. Although preventing interference with the police is a legitimate state objective, the ordinance is not narrowly tailored to that objective; it condemns equally language which does interfere and language which does not.

The ordinance's proscription of a broader class of speech than "fighting words" cannot be upheld as a reasonable regulation of the time, place, and manner of speech. The court below apparently seized upon this doctrine as most recently stated in *Grayned v. City of Rockford, supra*, to uphold the instant ordinance.[9] Under the test "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford, supra*, at 116, this Court has upheld bans on picketing at courthouses, *Cox v. Louisiana, supra*, gatherings at prisons, *Adderley v. Florida, supra*, and noisy

[9] *City of New Orleans v. Lewis*, 269 So.2d at 455-456

disruptive activity near schools, *Grayned v. City of Rockford, supra.* The opinion below however reflects little reasoning as to why the court thought the ordinance could be upheld on this basis. Certainly the usual meeting of a citizen and a police officer, especially a citizen whom the police are seeking to arrest or investigate, is not usually so sedate and tranquil, like the atmosphere of a school, *Grayned v. City of Rockford, supra, Tinker v. Des Moines School District*, 393 U.S. 503 (1969), a library, *Brown v. Louisiana*, 383 U.S. 131 (1966), or courthouse, *Cox v. Louisiana, supra*, that the utterance of certain language will automatically destroy the purpose of the meeting. Quite the contrary is true; as we shall show in Part V, *infra* pp. 29-39, many of the meetings between citizen and police are tumultuous, already violent, situations. It can hardly be believed that the utterance of opprobrious language by an arrested subject being placed in custody or of a citizen being pursued for arrest is likely to deter the officer or defeat his purpose. If the citizen may use opprobrious but not "fighting words" to another citizen, it is hard to see some unique aspect of the citizen-police encounter that suggests that opprobrious language is universally "incompatible" with that encounter.

Assuming arguendo that opprobrious language might under certain circumstances effectively prevent a police officer from discharging his duties and that opprobrious language might under certain circumstances be incompatible with an officer's duties, the ordinance below nevertheless totally fails to focus on those limited objectives; its broad proscription, therefore, of all opprobrious speech under all circumstances cannot be sustained.

V.

IN THE CONTEXT OF AN ORDINANCE LIMITED TO WORDS SPOKEN OF OR TO THE POLICE THE "FIGHTING WORDS" STANDARD MUST BE EITHER WRITTEN, INTERPRETED OR APPLIED SO AS NOT TO PERMIT THE PUNISHMENT OF LANGUAGE WHICH POSES NO DANGER TO SOCIETY OR TO THE POLICE AND WHICH IN FACT FULFILLS A LEGITIMATE FIRST AMENDMENT INTEREST BECAUSE UTTERED ONLY AS AN EMOTIONAL RESPONSE, WITHOUT SPECIFIC INTENT TO PROVOKE A VIOLENT REACTION, UNDER CIRCUMSTANCES SUCH THAT THE OFFICER CANNOT REASONABLY BE EXPECTED TO INTERPRET THE LANGUAGE AS HAVING AN INTENT TO PROVOKE, AND UNDER CIRCUMSTANCES SUCH THAT THERE IS NO LIKELIHOOD OF A VIOLENT RESPONSE. THE ORDINANCE HERE, BOTH AS WRITTEN AND AS CONSTRUED, IS NOT THUS CONSTITUTIONALLY LIMITED NOR HAS IT BEEN SO APPLIED IN THE INSTANT CASE.

The proposition that "fighting words" are not protected by the First Amendment is one that has been accorded consistent deference. *Chaplinsky v. New Hampshire, supra; Cohen v. California, supra; Bachellar v. Maryland, supra; Street v. New York, supra; Gooding v. Wilson, supra.* The concept embodies a form of the clear and present danger doctrine and is designed to permit speech that is merely annoying, disturbing, or insulting, while excising speech which is likely to result in an immediate violent response. Cf. *Terminiello v. Chicago, supra*. Under *Gooding v. Wilson, supra*, and *Cohen v. California, supra*, it is now clear that it is this tendency to a violent response that alone justifies this exception to the First Amendment; the intrinsic wording, no matter

how offensive or obscene, does not in and of itself, without more, warrant punishment.

Given the rationale of the "fighting words" doctrine it is clear that properly applied it should never result in the punishment of language uttered without danger of violence. The actual application of the standard is not however an easy matter, and as the opinion below suggests there is an inclination on the part of some courts simply to declare that all obscene and insulting language constitute "fighting words." The opinions of this court provide little specific guidance. In *Chaplinsky v. New Hampshire, supra* at 574, this Court said:

> "Argument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation."

At the same time this Court, in *Gooding v. Wilson, supra* at 525, has said of the words, "God damn you, why don't you get out of the road."

> "Plainly, although 'conveying . . . disgrace' or 'harsh insulting language' these were not words 'which by their very utterance . . . tend to incite an immediate breach of the peace'."

Although the original *Chaplinsky* "fighting words" standard applies to all language that is "likely to cause the average addressee to fight," *Chaplinsky v. New Hampshire, supra*, at 573, there is no constitutional or practical justification for defining or applying the standard so broadly when the words are spoken only to police officers. The Model Penal Code has adopted a distinction between the sort of conduct that will be tolerated when directed to the public and the sort of conduct that will be tolerated when directed only to the

police. This distinction has a constitutional foundation stated as follows:

> "Insofar as the theory of disorderly conduct rests on the tendency of the actor's behavior to provoke violence in others, one must suppose that policemen, employed and trained to maintain order, would be least likely to be provoked to disorderly responses." Model Penal Code §250.1, Comments, p. 14 (Tent. Draft No. 13, 1961).

Appellant does not believe, nor do the distinctions of the Model Penal Code suggest, that in no case should the utterance of mere words to a police officer be punished. But these words must at all times be measured by their real likelihood under the attendant circumstances of provoking violence. It is simply not constitutionally adequate to look at certain words and conclude that they are automatically "fighting words"; the appraisal of the language must be made by considering the circumstances of its utterance.

Since the ordinance here is directed at words uttered only to police officers, and, as the opinion below is at pains to point out, police are a distinct and unique group, it is appropriate at a minimum that the "fighting words" should be measured against a standard of what is likely to provoke the average policeman to violence. Under this standard it is not at all obvious that the words allegedly uttered by the appellant here are proscribed. This is not to say that these same words could never be "fighting words" when addressed only to the police. Both a court's view of the language spoken and the policeman's appraisal of that language can be properly made a factor of the intent with which that language is spoken as evidenced by the circumstances. Such a standard for distinguishing protected conduct from unprotected conduct has been

suggested as long ago as *Smith v. California*, 361 U.S. 147 (1959), where this Court held that the mere possession by a bookseller of obscene material could not be made unlawful without some showing of mens rea. The recent cases of this Court suggest that where the interest in First Amendment expression and the interest of society in preventing some specific harm compete, it is appropriate at least in part to determine whether the line between permissible First Amendment expression and forbidden conduct has been crossed by an appraisal of the actor's intent.[10] This concept is most clearly expressed in *Colten v. Kentucky, supra*, where this Court upheld a conviction for congregating in a public place after an order to move on, upon a state construction that the actor's *predominant intent* must be to cause public inconvenience, alarm, and annoyance. This *predominant intent* must mean that the actor had either no intent to exercise his First Amendment freedom or that his interest in that expression was miniscule. *Colten v. Kentucky, supra* at 111.

The application of such an analysis to words addressed to the police would permit the punishment of willful taunts, calculated to provoke violence, or uttered for no apparent reason other than to raise the possibility of such violence while leaving unrestricted the careless, impulsive utterance of a citizen who feels himself actually aggrieved by specific police conduct directed to him. Although this latter form of speech may be indelicately framed as indeed is alleged here, appellant submits that it is

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[10] See, "A Selective Survey of Supreme Court Decisions in Criminal Law and Procedure," Anthony G. Amsterdam, 5 Crim. Law Bull. 389 (1973), in which Professor Amsterdam reads this Court's recent decisions involving disorderly conduct ordinances as requiring such "ordinances to have a scienter requirement." *Id* at 396.

protected not only because under the circumstances spoken it is not likely to provoke violence but also because there are affirmative First Amendment reasons for allowing such language.

In *Cohen v. California, supra*, at 25-26, Justice Harlan said of the purposes of the free speech guarantee:

> "... we cannot overlook the fact ... that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detailed explication, but otherwise, inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed as Mr. Justice Frankfurter has said, '[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.' *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)."

The utterance alleged in the instant case, like many perhaps spoken in the course of a police-citizen meeting where the citizen, rightly or wrongly, feels himself aggrieved, is precisely the sort of speech which serves a useful emotive function. It is nothing more than the expression of a pent-up emotion and a sense of frustration, feelings from which all people suffer at varying times and which as civilized persons we are taught not to exhibit physically but to act out in some harmless fashion. The fact that the emotion here was expressed in

the form of indelicate language is under *Cohen v. California, supra*, and *Gooding v. Wilson, supra*, not decisive. Unless amounting to fighting words the message it communicates is as protected as the clever pun or the elegant put-down a Shakespeare or a Churchill might utter in a like situation.

In determining what constitutes "fighting words" in the police-citizen contest, therefore, it is necessary to regard not only the sensibilities of the police officer but also the intent of the actor. It simply cannot be facilely assumed that utterances such as the one being considered here never serve a legitimate communicative function. If in the mind of the actor no violence is intended and if in the mind of the auditor no violent response is considered there is no constitutional justification for outlawing the utterance. The distinctions that the appellant suggests, revolving in part around the actor's intent, would not serve to leave the police vulnerable to a hail of obscenities or turn the streets into a raucous and offensive scenario. The willful taunting and railing of the police, as in a chanting picket line, would be punishable not only because the police might respond violently to such a massing of abuse[11] but also because no justification or explanation could be offered for such behavior other than an intent to provoke such violence. Similarly, the single act of walking up to a police officer patrolling the street and verbally abusing him would also be punishable because a similar intent to provoke would be apparent. Language, however, that was impulsively uttered in a stressful situation would be protected both because a violent response would be unreasonable, unwarranted and unexpected and because the words were spoken to express a sudden emotional feeling without a considered

[11] Cf. *Winters v. New York*, 333 U.S. 507 (1948)

intent to provoke. The distinction would not be difficult for either the police or the courts to make. It is not unreasonable to believe that the police officer can comprehend the motivation for an utterance. When a police stop, frisk, interrogation or arrest is in progress, the officer, although he be performing his duty honestly and ably, can full well appreciate that the citizen may probably feel aggrieved and can full well understand the citizen's utterances as expressions of this reaction. Compare, *Thompson v. Louisville*, 326 U.S. 199, at 206 (1960).

In the course of a police officer's duty, he may be forced to do things which while legitimate and justifiable are highly obnoxious to a citizen. Receiving a report that a man in a green car had just shot and killed two people from out of the car window, a police officer might be acting reasonably if he stopped a car closely matching that description and in the immediate neighborhood of the crime, and without time for an explanation harshly shoved the driver up against the car, and immediately frisked him. If the driver of the car was the wrong person, he would doubtless be outraged and inclined to use some condemning language. Such a response would not only be understandable, but would doubtless be forseeable in the mind of the policeman and unlikely to provoke violence from him. The language could not by anyone be construed as intending to provoke the officer. On the other hand, when a police officer is suddenly and personally assailed with a torrent of abuse from a citizen with whom he has had no contact, he and the courts might fairly presume that the abuse was intended to provoke him.

In *Williams v. District of Columbia*, 419 F.2d 638 (D.C. Cir., 1969) (en banc) the court suggested the analysis

that the appellant proposes here. Finding that the "circumstances under which words are spoken are of critical importance in deciding whether the Constitution permits punishment to be imposed," 419 F.2d 645, and noting the distinctions of the Model Penal Code the court remarked:

> "A policeman's special powers and training, and his constant exposure to situations where the norms of common speech are not distinguished by unvarying delicacy of expression, leave him less free to react as quickly as the private citizen to a purely verbal assault. In a situation where he is both the victim of the provocative words of abuse and the public official entrusted with a discretion to initiate through arrest the criminal process, the policeman may ordinarily at least be under a necessity to preface arrest with a warning. It would appear that there is no First Amendment right to engage in deliberate and continued baiting of policeman by verbal excesses which have no apparent purpose other than to provoke a violent reaction." 419 F.2d 640, fn. 23.

The reference in this comment to the special powers of the police to make an arrest suggests another reason to insure that in the context of the police-citizen encounter the "fighting words" standard be applied most strictly. Anything less gives the police officer, who is both the victim and the magistrate,[12] unbridled discretion in making arrests; it is this discretion that permits great abuses of the ordinance under consideration here. Cf. *Papachristou v. Jacksonville*, 405 U.S. 156 (1972). For a

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[12] Charges such as the instant one are, in New Orleans at least, filed by direct affidavit by the police officer, without prior review by a District Attorney or magistrate. (A. 3-6).

compilation of cases in which citizens have been dealt with somewhat arbitrarily under ordinances akin to this one, see the Model Penal Code §250.1, Comment at pp. 15-18 (Tent. Draft No. 13, 1961).

Appellant is not suggesting that the "fighting words" standard has no applicability to words spoken to the police; appellant is not suggesting that because of their special training and their high standard of conduct the police should be made vulnerable to all forms of speech. Appellant is merely suggesting a technique that in light of the nature of police-citizen contacts provides a basis for making rational distinctions between speech that is willfully provocative and punishable and speech that poses no danger and fulfills a legitimate First Amendment interest. The opinion of the Louisiana Supreme Court below provides no basis for making these distinctions; thus even if it can conceivably be read as limiting Section 49-7 to some concept of "fighting words," it does so in a fashion so vague as to remain overbroad. It fails to enunciate whether the "fighting words" are to be measured against the sensibilities of the average person or of the average police officer; it fails to draw distinctions between words which, while on their face might provoke even an average officer, would not be expected to do so under a given set of circumstances; and it fails to consider the possibility that some words which in some situations might properly be regarded as "fighting words" in other situations are uttered without any intent to provoke and have a substantial content worthy of First Amendment protection.

Appellant submits that not only is the ordinance still overbroad and vague but also that, under the distinctions made above, her speech was itself protected by the First Amendment and was not properly punishable under the

"fighting words" doctrine. Trial counsel below was not permitted to examine the police officer as to his knowledge concerning the arrest of Joseph Lewis, Jr., although the court did appear to assume that the officer both knew of the reasons for that arrest and knew why the appellant was following him. (A. 14). Mrs. Lewis's son had been arrested; she didn't know why; she had been told to follow the police to the lock-up if she wanted to find out; she was concerned about her son's welfare; one police car drove ahead of her slowly; the police officer suddenly stopped her and her husband and for no apparent reason asked her husband for his driver's license. Assuming she did utter the words attributed to her, she obviously did so as evidence of her personal frustration, not unreasonable and unforseeable in the circumstances and not with the intention of provoking the police officer. Her words were an expression both of her internal anger and her intention to go beyond the individual officer and seek relief from higher officials. Under the analysis suggested above the ordinance therefore, at a minimum, has been unconstitutionally applied because the utterance here was made without any intent to provoke and under circumstances unlikely to result in a provocation; it was therefore protected by the First Amendment.

CONCLUSION

For the above and foregoing reasons the judgments below affirming appellant's convictions should be reversed.

Respectfully submitted,

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